

UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS
HEARINGS: THE ROLE OF THE SPECIAL TRUSTEE WITHIN THE
DEPARTMENT OF THE INTERIOR
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I am grateful to the Committee for the opportunity to present testimony on the role of the Special Trustee within the Department of the Interior.

The Failure of the Department of the Interior to Reform American Indian Trust Fund Management Programs and the Role of the Special Trustee

On September 19, 1995 I was appointed the first Special Trustee for American Indians and served in that capacity until 1999 when I resigned rather than accept the reorganization of the Office of the Special Trustee set forth in Secretarial Order 3346, dated January 5, 1999.

The Order was the last of a series of Department of Interior (Department) decisions taken over my tenure as Special Trustee to usurp the powers, duties and responsibilities vested in the Special Trustee, The Office of the Special Trustee (OST) and the Advisory Board by the American Indian Trust Fund Management Reform Act of 1994 (Reform Act). For all practical purposes the cumulative effect of these Departmental actions and policies deprived the Special Trustee, the Office of the Special Trustee and the Advisory Board of the independence and the authority that was intended by the Reform Act and the resources, principally managerial resources, necessary to carry out the duties and responsibilities of the Special Trustee and the Office of the Special Trustee.

Since the Reform Act was passed in 1994, the Department's record regarding the role of the Special Trustee in trust management reform demonstrates over and over again that the reform efforts of OST were under-funded, under-staffed, delayed and otherwise frustrated in favor of higher Departmental priorities. The Reform Act was fundamentally flawed in one important respect in that it failed to provide the Special Trustee, the Office of the Special Trustee and its Advisory Board with the independence and the authority to carry out the purposes of the Act. More important, over the objections of the Special Trustee, the Department has failed to address the primary cause of the longstanding trust management problems: the mismanagement and neglect inherent in the Bureau of Indian Affairs, the resolution of which is required before any meaningful reform can be implemented. The result has been a near complete failure to date in bringing about any effective reform of the Indian trust management activities of the Department and the Bureau of Indian Affairs.

In 1997, as Special Trustee, I filed a strategic plan with the Secretary of the Interior (Secretary), OMB and the C the Reform Act of 1994. As required by the Act, the submission was "a comprehensive strategic plan for all pha management business cycle that will ensure proper and efficient discharge of the Secretary's trust responsibilities.' a few points I made in testimony at the time as I believe, with a few exceptions, problems with the trust managem prospects for reform are much the same today as they were then. Since my departure in 1999, I have followed c Congressional hearings and other public reports on Indian trust reform with a great deal of interest and have some observations as well.

The Primary Problem with Trust Reform and the Government's Failure to Deal with It.

The problems in the trust management systems are longstanding ones. Mismanagement and neglect have allowed management systems, record keeping systems and risk management systems to deteriorate over a 20 to 30 year period, making them obsolete and ineffective. For many of those years, including many years since 1990, the trust programs were seriously underfunded and underfunded. The result was that the government increasingly was unable to keep pace with the rapid change in technology, trust systems and prudential best practices taking place in the private sector trust industry. This gap has increased until the reforms outlined in the Strategic Plan are funded and implemented.

If recent filings by the Special Master and the Court Monitor in the IIM litigation (Cobell vs. Babbitt) are indicative of the current situation, that gap has not been closed and the prospects for a timely solution are not very good.

There are two contributing factors and one primary cause of the mismanagement and neglect that have contributed to Indian trust management problems:

Contributing Factors to Trust Mismanagement and Neglect

1. One of the historical factors impacting the trust management problems can be attributed to the trade-off between financial and managerial resources which take place at every level of government between trust management activities (trust resource management, trust funds management and land title and records management) and other activities of the Bureau of Indian Affairs, the Department of the Interior, the Administration and the Congress. History has consistently shown these politically expedient government trade-offs of competing financial and managerial resources to be adverse and detrimental to the effective and proper administration and funding of the trust management activities.

These trade-offs have been made and are continuing to be made even in the face of a long history of court decisions that consistently held the trust relationship between the United States and the American Indians to be a distinct trust. Decisions of the Supreme Court reviewing the legality of administrative conduct in managing Indian property have placed a high burden on officials of the United States to "moral obligations of the highest responsibility and trust" and "the most exacting standards," and "bound by every moral and equitable consideration to discharge its trust with good faith and

2. Another important factor contributing to trust management problems is the way the BIA is organized and manages its trust management activities. The BIA's organizational alignment causes decision-making and management for Indian Trust Money (ITM) and Tribal issues to be an intricate and complex coordination process and an ineffective one.

Primary Cause of Trust Mismanagement and Neglect

The primary cause of the longstanding trust management problems is lack of competent managerial resources to manage and efficiently the trust management responsibilities to American Indian beneficiaries. Managers and staff of the Interior BIA have virtually no effective knowledge or practical experience with the type of trust management policies, procedures, and best practices that are so effective, efficient and prevalent in private sector trust departments and companies. Field office managers do not have the background, the training, the experience, and the financial and trust qualifications necessary to manage the Federal Government's trust management activities according to the exacting fiduciary standards of today's modern trust environment. Thus, and through no fault of their own, and even assuming adequate financial resources were made available, they are not capable of managing effectively and efficiently the Federal Government's trust management activities on a par with that provided by private sector institutions to their trust customers.

The lack of trust managerial competence and the lack of financial trust orientation and focus throughout the BIA and the Department of the Interior have been institutionalized over many years and are now inherent in the BIA organizational culture. A large part:

- A. Why the BIA has never originated meaningful reforms of the trust management processes in the last 30 years.
- B. Why the BIA has resisted and ultimately failed to implement nearly all of the meaningful reform proposals in the last 30 years.
- C. Why a new organizational structure, new management and massive re-training are necessary for the future to effectively manage the Federal Government's trust responsibilities to American Indians and the management of the implementation of the reforms identified in the Reform Act of 1994.

For over twenty years knowledgeable and informed professionals have called the Bureau of Indian Affairs the worst managed agency in government. Every outside study, indeed, most internal studies I researched as Special Trustee agreed with that assessment.

My own research while Special Trustee led me to conclude that the vast majority of upper and middle level managers of Indian Affairs were incompetent and could not be retrained to manage the trust management activities on a par with private sector institutions to their trust beneficiaries. It was also my conclusion that the natural starting point for a reform designed to address mismanagement and neglect should be the removal of incompetent middle and upper managers at the Department. It is axiomatic in private sector restructuring that if management is the problem, management must be removed and replaced if restructuring and reform is to be successful. This formula was used successfully in all five of the first resolutions I participated in and managed while in the private sector. The formula is used over and over again in the resolution of countless public and private institutions in "extremis". Surely, no objective observer can doubt that the Bureau of Indian Affairs has been in "extremis" for some time. Nevertheless, as well-known, clear and practical a remedy as this, that in previous reform efforts over the last twenty-five years, no senior manager at the Bureau of Indian Affairs has been removed for incompetence. In addition, every reform effort in the last twenty-five years had been left largely in the hands of the very same incompetent BIA managers who contributed to the problem in the first place.

While Special Trustee, I became convinced and still believe that the Department did not and does not have the will to address "mismanagement" issues and force out the incompetent managers, nor was and is the Department likely to attract the resources willing and able to undertake a timely reform effort within the Department of the Interior. Without both, no reform could succeed. I therefore recommended to the Secretary of the Interior in the 1997 Strategic Plan that the Department establish the establishment of an independent agency, outside the Department of the Interior, to manage the Indian trust management reform effort. The Secretary instead opted for the Department's historical approach to reform and decided that the reform be undertaken solely by the Department of the Interior. Again, in August 1997, I recommended that the reform effort, what later became the High Level Implementation Plan not be left largely in the hands of the Bureau of Indian Affairs. The Secretary again opted for the Department's historical approach and decided in favor of the BIA's managing most of the reform effort. High Level Implementation Plan.

The Department currently is using the same basic historical approach to reform, apparently with as little success as the previous Administration. Recent court filings in the IIM Litigation indicate just how unsuccessful the High Level Implementation Plan successor reform plans have been. Based on these filings, just last week on September 17, 2002, U.S. District Judge J. Lamberth held Secretary of the Interior Gale A. Norton and a senior aide in contempt of court for deceiving him in his failure to reform the trust fund activities. He found four instances where Secretary Norton and Neal McCaleb, as Secretary of Indian affairs, had committed fraud on the court, and the judge held them in contempt for failing to abide by a three

order to begin major reform of the trust. Just a few findings from Judge Lamberth's 267 page opinion reinforce the points I made above but in much stronger and more eloquent terms:

"The agency has indisputably proven to the court, Congress, and the individual Indian beneficiaries that it is either unwilling or unable to administer competently the trust,"

"Worse yet, the department has now undeniably shown that it can no longer be trusted to state accurately the status of its trust reform efforts. In short, there is no longer any doubt that the secretary of Interior has been and continues to be an unfit trustee-delegate for the United States."

"the Individual Indian Money trust has served as the gold standard for mismanagement by the federal government for more than a century. As the trustee-delegate of the United States, the Secretary of the Interior does not know the precise number of IIM trust accounts she is to administer and protect, how much money is or should be in the trust, or even the proper balance for each account."

Circumstances Warrant an Alternative Structure Outside the Department of the Interior to Reform BIA and the Indian Trust Management Programs.

Managerial incompetence, mismanagement and neglect in the Department's management of the Indian trust management programs have resulted in conditions that are unacceptable by any reasonable standards and continue to do significant damage to American Indian trust beneficiaries. They have also caused permanent damage to the core trust management systems the government uses to manage the Indian lands and monies. These defective systems prevent the government from meeting the fiduciary, accounting and reporting standards required by the American Indian Trust Fund Management Reform Act of 1994 and standards of ordinary prudence applicable to all trustees, public or private. This serious breach of trust exposes the government to liability and loss that compare to the exposure and losses the government experienced in resolving some of the largest failures during the financial crisis of the late 1980s and early 1990s. Until "mismanagement" issues are addressed by the Department of the Interior and Bureau of Indian Affairs, no meaningful reform can take place and the government's exposure to loss and liability to Indian trust beneficiaries will continue to escalate.

The record shows and I believe that the Department does not have the will or ability to address the “mismanagement” of the incompetent managers at BIA, nor is the Department likely to attract competent managers willing and able to carry out a timely reform effort within the Department of the Interior. Without both, no reform effort can succeed. In the circumstances, alternative reform structures managed and implemented outside the Department of the Interior should be considered. The United States, the ultimate trustee of the American Indian trusts.

In their present circumstances and condition, if the Indian trust management activities managed by the Department of the Interior were housed in and managed by a private sector financial institution, that institution would be declared bankrupt, its management and staff would be removed and replaced and a responsible successor trustee would be appointed to manage the trust. The government that is allowing the Indian breach of trust to continue. While considered “extreme” by some, this is a private sector remedy for bankrupt institutions and one that should be considered in reforming the bankrupt Bureau of Indian Affairs.

The United States government itself used this so-called “extreme” remedy over and over again from 1980 through 2008. The financial institution crisis resulted in 2,912 failed or assisted financial institutions. The FDIC and/or Resolution Trust Corporation (RTC) gave government assistance in resolving each of these institutions, such that over 99% of depositor beneficiaries (uninsured) received 100% of their deposit balances in cash. In every major case, the government required senior staff of the failed or assisted institution to resign before it provided government assistance to depositors, creditors and other stakeholders of financial institutions. The government’s exposure to liability and loss as a result of its continued breach of trust in the management of American Indian trusts is at least equal to the exposure to loss created by many of the largest bank and thrift failures of the early 1980s, which were addressed with the same urgency that the government used in resolving the financial institution crisis of the early 1980s.

The BIA’s mismanagement of the Indian trusts, particularly as regards records management, asset management and financial management, has exposed the government to liability and loss, the magnitude of which also compares to losses and accounting deficiencies at WorldCom, Global Crossing, Enron and Arthur Andersen. Management has been fired at each one of those bankrupt companies. Most of the staff will lose their jobs. None will survive their bankruptcies with a structure anything like their pre-bankruptcy structure.

It is time for the federal government to consider a reform resolution for the Department and BIA along the lines used for the reform of financial institutions or large bankrupt corporations, especially in light of the fact that the Department has failed to carry out a reform effort within. As a result, such a so-called “extreme” remedy seems warranted for the BIA before the government’s exposure to liability escalates further as a result of the continued breach of trust.

Recommendation

The history of numerous Indian trust reform efforts over the last thirty years has shown that the Department of the Interior has been unable to implement the types of reforms and management changes necessary to manage the Government's trust activities according to the exacting fiduciary standards required in today's modern trust environment. It is for this reason that the Commission recommended in the 1997 Strategic Plan and to the Secretary in 1997 and recommend now that Congress consider the creation of an independent government sponsored enterprise to manage the U. S. Government's trust management responsibilities for the American Indian Tribes for trust resource management, trust funds management and land title and record management according to the most exacting fiduciary standards and moral obligations of the highest responsibility and trust.

History and Performance of the Office of the Special Trustee

From the inception of OST in September 1995, neither the Special Trustee nor the Office of the Special Trustee had direct authority under the Reform Act of 1994 to initiate reforms or to implement those trust management reforms that were approved following the filing of the Special Trustee's strategic plan in April, 1997. Nor did the Secretary elect to vest the Special Trustee and the OST with the direct authority to implement the reforms except at the Office of Trust Funds Management (OTFM) that has reported to the Special Trustee since February 1996. Instead, the Special Trustee and the OST were limited to oversight of the vast majority of the reform efforts that were to be implemented in the same manner as previous unsuccessful reform efforts, i.e., directly by the Bureau of Indian Affairs (Bureau) and other affected units.

During the 1996 to 1999 period, the record shows a dramatic difference between the very successful reform results achieved by OST directly at OTFM; the minimal results achieved through oversight of the Bureau's reform efforts; and the negative results achieved through oversight of the Department's record keeping reform efforts.

On July 31, 1998 the Secretary of the Interior approved the High Level Implementation Plan (HLIP) which, in his view, provided the structure through which the Department could accomplish the successful resolution of the many decades-old Indian Trust Funds problems. Of 13 sub projects, OST had direct line responsibility for only 2 sub projects: Individual Indian Money (IIM) and OST data cleanup and the trust funds accounting system (TFAS) used for both IIM and tribal accounts. OST had started planning for these two tasks in 1996 and was able to begin implementation in 1996 and 1997 despite the limited managerial and financial resources which were made available by the Department. When Congress approved significant funding for 1998, OST and OTFM were able to show excellent results as reflected by the HLIP progress reports that have been made public.

The implementation of the trust funds accounting system by OST also was a successful reform effort. After being held up by the Department for over a year, OST in 1998 obtained all necessary approvals, awarded a TFAS contract, conducted a successful pilot and had implemented the system ahead of schedule. It is the only trust accounting system to have had any success in the reform of the Indian trust management systems.

On the other hand, concerns over the BIA's data cleanup and systems efforts were relayed in writing to the Secretary by OST as early as July 1998 and for this reason the Special Trustee did not recommend approval of the Bureau's part of the HLIP. Public and litigation filings to date show that the seven sub projects that were to be implemented principally by the Bureau of Indian Affairs were not implemented by the Secretary's imposed deadline of year-end 2000. The Department still has not been successful in bringing about material reform. Records cleanup has been inadequate. Systems design and implementation of asset management and ownership systems plans substantially failed. The Bureau's record to date in this reform effort mirrors its historical failures to manage and implement meaningful reform. The Department is now estimating that it will take at least until 2005 to implement still another reform plan being proposed by the Department. Given its historical record, I have no confidence that any reform effort managed by the Department will be successful.

An even larger threat to the overall reform effort is the Department's continued inability or unwillingness to address the fundamental trust record keeping problems and systems that account for the vast majority of the Indian trust management operating and accounting problems. For this reason, during my tenure as Special Trustee, the Special Trustee and OST, in their oversight capacity, presented several comprehensive plans to bring the Department's trust account records management function up to the standards that would govern a commercial trustee. None of these efforts were accepted and the HLIP gave no definitive guidance on the issue. For this reason the Special Trustee noted to the Secretary on July 31, 1998:

Since a joint Indian trust records management solution is fundamental to the successful implementation of the other Sub-Projects of the high level implementation plan and since all affected Bureaus have not yet agreed on a

solution, the high level implementation plan being presented for surname and your approval will not in my opinion enable the Department to comply with the Reform Act and the Secretary's Agreement dated August 22, 1997.

To my knowledge there is still no records retention policy that meets common law trust standards, a condition precedent for any adequate trust records management system. Nor is there a records management system to retain trust documents, keep records and furnish information, sufficient to provide an accounting to the beneficiaries or to meet the accounting, accuracy and reporting requirements of the Reform Act of 1994.

The Department's failure to address and resolve the trust record keeping problems jeopardizes the entire reform effort. Without the accurate records required by the Reform Act and common law standards, systems improvements planned for trust fund accounting, asset management and land title and records will be ineffective and will not permit the Department to comply with the accounting, reporting and accuracy standards required by the Reform Act of 1994.

In 1999 the Department was criticized and sanctioned for ongoing mismanagement and neglect of the Indian trust records. The Secretary and the Assistant Secretary in charge of the Bureau of Indian Affairs were held in civil contempt of an U. S. District Court's document production orders. The case (Cobell vs. Babbitt) underlying the contempt proceeding is essentially a trust administration action in which the Indian beneficiaries seek an accounting. The court has not to this point in the case addressed the detailed statutory and common law trust duties owed by the government as trustee to the individual Indian beneficiaries. Nonetheless, the court noted "it is basic hornbook law that the trustee has the duties of retaining trust documents, keeping records, furnishing information to the beneficiary, and providing an accounting." The court further noted: "the court will appoint a special master to oversee discovery, document production, and related matters and to effectuate compliance with this court's orders. The defendants simply cannot be trusted to do this job themselves." If recent filings (2001 and 2002) by the Special Master and by the Court Monitor in the IIM Litigation are indicative of the present situation, the Department still cannot be trusted to do this job.

The Performance of the Office of the Special Trustee

The recent record of the Department and the Bureau of Indian Affairs in planning and implementing trust management reform is only the most recent demonstration of their historical failures to bring about meaningful trust management reform. There has been some success, notably the progress of OST and OTFM in cleaning up the IIM records, in implementing a new trust funds accounting system and in the administration of OTFM. These modest successes demonstrated that significant reform is possible when an office has the responsibility, the authority, the independence and the financial and managerial resources to carry out the reform. As noted, The Reform Act of 1994 called for a Special Trustee and an OST to oversee the reform effort but with no direct authority to ensure that the purposes of the Act were carried out. The Act was flawed in that respect. Despite aggressive oversight activities by the Special Trustees and OST over the last several years, the oversight efforts proved largely ineffective in ensuring that the Department

complied with the Act. In this respect, the OST can be chalked up as another failed reform vehicle. On the other hand, the OST's lasting contributions were in further exposing the Department's Indian trust management deficiencies, in keeping these issues before the Congress, the Judiciary and the public and in proposing permanent, practical solutions to these longstanding problems. In addition, OST was often the only voice in government representing the interests and concerns of the American Indian trust beneficiaries who are entitled to and deserve the best possible management of the Indian trusts by the trustee. If such efforts eventually lead to the substantial resolution of the Indian trust management issues, OST can be counted a success.